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No. 94-1665

In the Supreme Court of the United States

OCTOBER TERM, 1994

F. DALE ROWLAND AND DENISE ROWLAND,
PETITIONERS

v.

DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the conclusion that the scars observed on petitioners' horse were located on the horse's pasterns.

2. Whether the interpretation of the Scar Rule, 9 C.F.R. 11.3, applied by the Secretary of Agriculture in finding that petitioners violated the Horse Protection Act, 15 U.S.C. 1824, is arbitrary and capricious or contrary to law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	8
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	8
Martin v. *OSHRC*, 499 U.S. 144 (1991)	7
Rogers v. *Lodge*, 458 U.S. 613 (1982)	6
Solorio v. *United States*, 483 U.S. 435 (1987)	9
Thomas Jefferson Univ. v. *Shalala*, 114 S. Ct. 2381 (1994)	7
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	6

Constitution, statutes and regulations:

U.S. Const. Amend. V	8
The Horse Protection Act, 15 U.S.C. 1821-1831	2
15 U.S.C. 1821(3)	2
15 U.S.C. 1822	2
15 U.S.C. 1823(c)	2
15 U.S.C. 1824(2)	2
15 U.S.C. 1824(3)	2
5 U.S.C. 556	4
5 U.S.C. 557	4
7 C.F.R. 2.35	4
9 C.F.R.:	
Section 11.3	2, 3, 4, 7
Section 11.7	2

Miscellaneous:

44 Fed. Reg. 25,176 (1979)	4, 6, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 43 F.3d 1112. The final decision of the Secretary of Agriculture (Pet. App. 9a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1995. The petition for a writ of certiorari was filed on April 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Horse Protection Act (Act), 15 U.S.C. 1821-1831, prohibits showing or exhibiting, or entering for the purpose of showing or exhibiting, any horse that is "sore." 15 U.S.C. 1824(2). A horse is considered sore if its limbs have been purposefully injured or irritated in training. 15 U.S.C. 1821(3). The Act was designed to prevent the "cruel and inhumane" practice (15 U.S.C. 1822) of "soring" horses to improve their performance, by, for example, inducing the high stepping gait for which Tennessee Walking Horses are known. Pet. App. 2a.

2. In June 1991, petitioners entered "Quarterback Stock," their champion Tennessee Walking Horse, in the Greenback Classic Horse Show at Randolph, Ohio. Pet. App. 58a. Before Quarterback Stock entered the ring, its legs were inspected by a Designated Qualified Person (DQP)[1] for signs of soring. The DQP approved Quarterback Stock for competition. *Id.* at 2a. The two United States Department of Agriculture (USDA) veterinarians who inspected Quarterback Stock, however, noted bilateral raised hairless scars on the horse and concluded, by applying the Scar Rule, 9 C.F.R. 11.3, that Quarterback Stock was "sore." Pet. App. 2a-3a, 6a. Under the Scar Rule, a horse is considered sore if the pastern areas of its legs show any evidence of abuse, which includes, but is not limited to, excessive loss of

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[1] Under the Act and its implementing regulations, the management of a horse show or exhibition is required to employ a DQP "to inspect horses to detect or diagnose soring." 9 C.F.R. 11.7; see also 15 U.S.C. 1823(c). The failure to employ a DQP may subject management to liability under the Act if a sore horse is shown or exhibited. 15 U.S.C. 1824(3).

hair.[2] Both USDA veterinarians noted that Quarterback Stock showed no signs of sensitivity in the scarred area.

3. The Animal and Plant Health Inspection Service (APHIS), a division of USDA, filed an administrative complaint charging petitioners with entering a sore horse in competition in violation of the Act. Pet. App. 54a. APHIS requested that civil penalties be imposed and that petitioners be disqualified from participating in horse exhibitions. *Ibid.* Following a disciplinary hearing, the administrative law judge (ALJ) dismissed the complaint. *Id.* at 54a-77a. Although the ALJ credited the testimony of the USDA veterinarians and found that the bilateral scars on the pastern area of Quarterback Stock's legs were indicative of soring, the ALJ nevertheless concluded that the horse had healed as fully as possible and therefore could not be considered "sore" under the Scar Rule. *Id.* at 71a-76a. The ALJ construed the Scar Rule as applying only to scarred horses that still suffered from injuries incurred in the soring process, not to scarred horses that no longer exhibited physical sensitivity in the scarred area. *Id.* at 72a, 76a.[3]

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[2] The Scar Rule provides in relevant part that "[t]he anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of * * * evidence of abuse indicative of soring including, but not limited to, excessive loss of hair." 9 C.F.R. 11.3. Any horse not meeting the Scar Rule criteria "shall be considered to be 'sore.'" *Ibid.*

[3] The ALJ based his interpretation of the Scar Rule on a comment made by the Secretary in the *Federal Register* in conjunction with publication of the final rule. Pet. App. 71a. The Secretary, in response to a comment criticizing the Scar Rule's "once sore-always sore" presumption, stated that "it is

USDA appealed to the Judicial Officer,[4] who affirmed the ALJ's factual findings but rejected his interpretation of the Scar Rule. Pet. App. 9a-53a. The Judicial Officer determined that the Scar Rule is "clear and unambiguous," its language plainly stating that "all" horses born after October 1, 1975, that "do not meet the following scar rule criteria shall be considered to be 'sore' and are subject to all prohibitions * * * of the Act." *Id.* at 37a (quoting 9 C.F.R. 11.3), 41a. To construe the Rule *not* to reach horses that plainly showed evidence of abuse not only would be contrary to the language of the Rule, the Judicial Officer reasoned, but would also undermine "the purpose of the Act * * * to end the practice of soring, not just the showing of sore horses." *Id.* at 44a.

Finally, the Judicial Officer concluded that the comments accompanying the promulgation of the Scar Rule did not support the ALJ's interpretation of the Rule. The Judicial Officer pointed out that in response to a proposal to eliminate "the concept of 'once sore-always sore,' which is associated with the scar rule," the Secretary found "no justification to change the proposed scar rule or its intent." Pet. App. 42a-43a (quoting 44 Fed. Reg. 25,176 (1979)). Accordingly, the Judicial Officer imposed on petitioners a civil penalty of $2,000 and disqualified them

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conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest, and time." 44 Fed. Reg. 25,176 (1979).

[4] The Secretary of Agriculture has delegated final administrative authority to the Judicial Officer to decide cases subject to 5 U.S.C. 556 and 5 U.S.C. 557. 7 C.F.R. 2.35.

from participating in horse shows for one year. Pet. App. 51a-52a.

4. The court of appeals denied a petition for review. Pet. App. 1a-8a. The court concluded that there was substantial evidence to support the Secretary's ruling that the horse was sore. *Id.* at 5a-6a. The court also concluded that the Secretary's interpretation of the Scar Rule is reasonable. *Id.* at 7a-8a. It reasoned that the Scar Rule explicitly requires that a horse be deemed sore unless its pasterns are free of evidence of abuse, including excessive loss of hair, and that an interpretation that would "allow scarred horses to compete because they are no longer in pain" would "eventually reward trainers who sore their horses," a result contrary to the purposes of the Act. *Id.* at 8a.

ARGUMENT

1. Petitioners contend (Pet. 9-11) that the court of appeals erred in upholding the Secretary's finding that Quarterback Stock was "sore" because there was conflicting evidence as to the location of the scars. Petitioners rely (Pet. 7) on the examination notes made by both USDA veterinarians indicating that scars were observed on Quarterback Stock's fetlocks, contending that the horse was not scarred on the pasterns as required by the Scar Rule.

The court of appeals concluded that "there was sufficient evidence to support the finding that scarring was present in the pastern area." Pet. App. 6a. It noted that both USDA veterinarians had testified that their notations of scarred "fetlocks" were not intended to exclude the pastern area. *Ibid.* The court cited the testimony of USDA veterinarian Dr. Gwen Lee who testified that scars on Quarter-

back Stock were "at the top of the pastern joint . . . towards the fetlock area." *Ibid.* The court also referred to the explanation given by USDA veterinarian Dr. Miava Binkley, who testified that she had referred to the fetlocks to "remind [her] these [scars] were slightly unusual, they were near the fetlocks, because they were slightly different than some other ones that [she] would normally see."[5] *Ibid.* Noting that the ALJ and the Judicial Officer both credited the USDA veterinarians' testimony, the court sustained the administrative findings that the scars were in the pastern area. *Ibid.* Further review of those factual findings—concurred in by the ALJ, the Judicial Officer, and the court of appeals—is not warranted. Cf. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985) (noting Court's general reluctance to disturb findings of fact concurred in by two lower courts); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (same).

2. Petitioners contend (Pet. 12-18) that the Secretary's construction of the Scar Rule is arbitrary and capricious and contrary to the Act, and that the court of appeals erred in upholding that interpretation. Petitioners rely (Pet. 13) on a comment that accompanied the promulgation of the Rule, in which the Secretary noted that it was "conceivable" that "a scarred horse could be restored to a satisfactory condition with proper care, rest, and time." 44 Fed. Reg. 25,176 (1979). Petitioners claim that this statement demonstrates that the Secretary

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[5] Dr. Binkley further explained that the long pastern bone extends to the fetlock joint and that the term "fetlock" is used "fairly loosely" by many horsemen "to refer to the [fetlock] joint or the area around the joint." Pet. App. 62a-63a.

misconstrued the Scar Rule by applying it to a scarred horse that was in no apparent pain.

"It is well established that an agency's construction of its own regulations is entitled to substantial deference." *Martin* v. *OSHRC*, 499 U.S. 144, 150 (1991) (internal quotation marks omitted). Indeed, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994) (internal quotation marks omitted). In this case, as both the court of appeals and the Judicial Officer correctly noted (Pet. App. 7a, 41a), the plain language of the Scar Rule supports the Secretary's interpretation: The Rule unambiguously provides that a horse "*must be free* of * * * bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair," or the horse "*shall* be considered to be 'sore' and * * * subject to all prohibitions * * * of the Act." 9 C.F.R. 11.3 (emphasis added). The Rule contains no exemption for horses that show evidence of abuse, but do not exhibit physical sensitivity in the scarred area.

Even if a single statement in the regulatory history could be taken to alter the meaning of a regulation as clear as the Scar Rule, the statement on which petitioners rely does not undermine the Secretary's interpretation. In response to a suggestion that the Secretary eliminate "the concept of 'once sore-always sore,' which is associated with the scar rule," the Secretary responded by stating:

> The Department would point out * * * that the scar rule applies only to horses that were foaled and trained well after the passage of the Horse Protection Act of 1970 * * *. Such horses should

> therefore bear no scars whatsoever if the law were being complied with. Additionally, it is conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest, and time. The Department therefore *finds no justification to change* the proposed scar rule or its intent.

44 Fed. Reg. 25,176 (1979) (Pet. App. 43a) (emphasis added). Contrary to petitioners' contention, this comment plainly expresses the Secretary's intention *not* to eliminate the "once sore-always sore" presumption associated with the Rule. The comment on which petitioners rely thus is properly understood, as the Judicial Officer explained, to mean only that a scarred horse conceivably could heal sufficiently so that it would no longer bear scars or evidence of soring, and thus would not fall within the ambit of the Scar Rule. Pet. App. 42a-43a.

The court of appeals correctly concluded that there was no basis for finding the Secretary's interpretation of the Scar Rule arbitrary and capricious. Pet. App. 7a-8a. Petitioners provide no support whatsoever for their contention (Pet. 4) that the courts of appeals have interpreted the Act and the regulations inconsistently. Accordingly, no further review is warranted.[6]

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[6] Petitioners also assert for the first time that they were deprived of due process under the Fifth Amendment because the Judicial Officer did not conduct a hearing. Pet. 5-6. This Court ordinarily declines to consider claims not raised before or addressed by the court of appeals. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Because petitioners had the opportunity to raise their due process challenge below, this Court should adhere to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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its general practice and refuse to consider petitioner's untimely claim. See *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987) (refusing to consider due process claim that could have been raised before the Court of Military Appeals). In any event, petitioners had an evidentiary hearing before an ALJ. No further administrative hearing was required.